THE WASHINGTON MEETING OF THE AMERICAN SOCIETY FOR THE JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES.

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Although the peace movement is still a movement of intellectuals it is no longer confined to idealists. That fact is amply illustrated by the personnel of the congress held at Washington, December 15–17, 1910, under the auspices of the American Society for Judicial Settlement of International Disputes.

The various groups of practical men in close touch with affairs—legislators, statesmen, educators and business men—who addressed the congress were likewise liberally represented in the crowded and interested audiences of the congress.[1]

The explanation of this change in the personnel of the peace workers lies partly in the fact that the growing waste of armaments has projected this question into the arena of practical politics; partly in the actual results accomplished by certain existing institutions, notably those set up at The Hague; together with the manifest need of additional institutions of a simple nature which it is folly to continue without. Among the latter that which in the minds of many men will do more to make war difficult than any institution thus far existing or suggested is a true international court of justice. It was toward the problem of

[1]Among the speakers at the congress will be found the President of the United States, two ex-Secretaries of State, the presidents of three of our leading universities and the president-emeritus of another, an ex-governor of Virginia, the governor-elect of Connecticut, former members of our own diplomatic service, the heads of three important foreign legations at Washington, present and former members of Congress, and several men foremost in American industry and commerce.

such a court—to supplement, not to supplant, the existing Permanent Court of Arbitration at The Hague—that the attention of the Congress was mainly directed.

The chief aim of the society was declared to be an international court which shall be permanent and shall be composed of judges by profession as distinguished from the present tribunals of arbitration which are temporary and are composed only partly of judges and partly of diplomats and statesmen not necessarily trained in the law. . . . "We believe the mere existence of such a court will attract cases . . . that public opinion will compel the submission of the case when and as it arises . . . that the judgment of the court, based upon law, will meet with ready and universal acceptance . . . and that the resultant peace will be permanent because just and because based upon law and its just interpretation."[2]

The great usefulness of the existing Hague conventions, particularly the Permanent Court of Arbitration, was freely and repeatedly acknowledged during the conference. Attention was called to the Affairs of Venezuela (1904) and to the Casablanca affair (1909) in which acute situations, the one involving national policy and the other supposedly involving national honor, were cleared up by submitting the cases to the Hague Court; and to the Newfoundland Fisheries dispute between Great Britain and the United States, a case which diplomacy had vainly attempted to settle for the greater part of a century and which the Hague Court disposed of in a few weeks (1910). Especial emphasis was laid on the fact that the very existence of the Hague Court is "an international question-mark whenever national passions are excited. If a nation smart under a sense of injury and would seek to avenge itself upon another nation and slay multitudes of men innocent of the sins or offenses of the few who happened to be in power or to be the provoking agents, the query arises in the minds of increasing thousands whether the trouble ought not to be

[2] J. B. Scott.

judicially adjusted under a provision of the Hague convention; and the inability to give a negative answer, or the inability on searching self-examination to justify one's revengeful attitude, alike tend toward peace. Thus the Hague conventions are bringing about a state of mind . . . which makes war hard and peace easy."[3]

The fertile mind of ancient Greece to which the world owes so much in the field of politics, was not dead to the advantages of arbitration.[4] Arbitration was practiced between the Greek states, and the King of Sparta is credited with the observation that it is impossible to take as a transgressor him who offers to lay his grievance before a tribunal of arbitration. Rome rejected the institution because she regarded herself as "the sovereign of the world" declining to accept other nations as her equal. In the middle ages the Pope not only was instrumental in having arbitration clauses introduced into treaties but boldly assumed the right to act as arbiter. In 1623 Émeric Crucé "proposed the establisnment at Venice of an assembly of ambassadors of all the nations of the world, oriental as well as occidental, who should settle all international disputes," while Grotius in his "War and Peace" (1625) "advocated congresses of Christian states at which international controversies shall be decided by disinterested powers, with authority to compel the parties to accept peace on equitable terms."[5]

A court to decide controversies between states actually appeared for the first time in history in the form of the Supreme Court of the United States, the United States being "a congeries of independent and antonomous . . . states with full rights of sovereignty, except so far as each has delegated to the general government certain powers essential to a unified existence.[6]

"In the Kansas *v.* Colorado case (185 U. S. 128) the court said that what elsewhere would be a cause of war, in this country would be discharged by resort to judicial power; that the

[3] J. H. Ralston.
[4] H. B. Brown.
[5] Idem.
[6] Idem.

court had jurisdiction on the question of the power of one state wholly to deprive another of the benefit of water rising in the former and by nature flowing into the latter, and that the Supreme Court sat as an international as well as a domestic tribunal and applied Federal law, State law, and International law, as the exigencies of the case demanded, and that while the Federal government in its legislation was one of enumerated powers, the entire judicial power of the United States was vested in the Supreme Court."[7]

A survey of the cases in the Supreme Court of the United States involving disputes between states,—boundary and other —was followed by the remark that the significance of these cases lies less in the fact that "by applying for the admission to the union the states agreed to the creation of an international court to settle all controversies between them, than to the universal acquiescence in the decrees of that court and in their enforcement without compulsory process."[8] This observation would fall when controversies of a burning nature should array a large number of states on one side against a large number on the other; "it was monstrous to suppose that a universal agitation could be quieted down by the opinion of a majority of nine men."[9]

Differences of religion and race make the problem of a high court before which all the nations shall on occasion yield their sovereignty much more difficult than was the problem of a supreme court for a group of states like the United States bound by ties of a common language and common institutions, but that which offers the greatest obstacle is "the conflicting interests of the nations always more selfish than the best of their citizens."[10]

The development of the American doctrine of the jurisdiction of courts over states was traced from the early colonial period[11]

[7] F. N. Judson.

[8] H. B. Brown.

[9] Idem.

[10] H. B. F. Macfarland.

[11] A. H. Snow.

in which the mother country was conceded to have only a "leadership in judgment"—the Greek attitude—as opposed to the actual power to command—the *imperium* of the Latins. It was out of this conception that the practice grew of binding our governments by written constitutions regarded as emanating from the people.

About the time the colonies were being founded the belief that courts could successfully exercise jurisdiction over states was markedly strengthened by the case of the Postnati which determined the status of Scots in England after the accession of James VI of Scotland to the throne of England as James I. The significant features of this case were that the court although nominally a conference between the Lords and Commons to which the judges of England were invited as counsellors, was in fact an extraordinary Tribunal; that the case was argued "from the standpoint of the civil law, 'the law of nations and of reason,' the history of nations and the common law"; that it settled a dispute between England and Scotland; and that it recognized a supreme law common to England and to the countries connected with her politically.[12]

Disputes between the colonies or between a colony and England were habitually referred to tribunals in England, which tribunals the colonies were willing to entrust England "with the duty of establishing and maintaining."[13] Therefore, it was natural that when the American colonies became independent of England, they should provide, first—under the articles of confederation—a tribunal to settle disputes between states, especially constructed for each case, and later,—under the Constitution—a permanent supreme court which should have jurisdiction of such disputes.

It is the conception of a "supreme universal law securing

[12] A. H. Snow.

"The judges arrived at the unanimous conclusion that Scots born after the accession of James to the throne of England (the postnati), were entitled in England to full civil rights of person and property, but had no political rights; and that Scots born before the Union were aliens in England."

[13] One of the important cases submitted and decided in this way was a boundary dispute between Maryland and Pennsylvania (1750).

the fundamental rights of the individual against all government," which is the basis of the indissoluble union of the United States of America; which has governed the conduct of local courts in America, in England and elsewhere, as well as of the Supreme Court of the United States; and which may prove "the most efficient bond of union" among the nations of the world if there is set up an international supreme court to which appeal may be had in the last resort. . . . "The test of the international character of a court is not whether it is established by the nations, but whether it administers a law which is supreme over the nations."[14]

The decisions of courts as a source of law were referred to as a most urgent reason why the Permanent Court of Arbitration at the Hague should be supplemented by a true international court of justice.[15] Such a court, dealing with various systems of law, would perhaps not build up the law as readily as a court governed by the principles of the English Common Law exclusively; but while in theory, Roman law courts are not governed by previous decisions, they do in point of fact constantly yield to precedent as set up in previous decisions. In contrast to the body of judge-made law which arises wherever true courts of justice exist, is the barrenness of the arbitration tribunal as a source of law.

The aim of a court of arbitration is to compose differences, and the spirit of compromise which prevails as a result thereof can hardly yield lasting principles of law or justice.[16]

This particular defect of arbitration is illustrated by the way in which industrial arbitration tends to precipitate conflict by reason of the belief that the principle of compromise will result in at least part of the demands, however, unjust, being

[14] A. H. Snow.

[15] Eugene Wambaugh.

[16] The justice of this criticism is realized when we recall the displeasure with which the Geneva Award is still regarded by many impartial minds because of its tendency to burden the neutral in time of war with duties more or less difficult to discharge, instead of placing the burdens of war where they belong, *i.e.*, on the belligerent. Sir Henry Maine felt that the principle laid down in the Geneva Award must some day be discarded.

granted. "Prospect of arbitration is felt by each combatant to diminish the risks he takes in joining battle. It often produces cessation of actual warfare, the reëstablishment of an interrupted industry and a brief truce; but in the large view and in the long run it rather encourages and promotes industrial strife than prevents it."[17]

The reference should be to some tribunal the controlling principle of which is justice so that "the parties to industrial strife . . . would be held back by the prospect of losing their whole case." This tribunal need not necessarily be a court but might well take the form of a board of inquiry as in Canada, public opinion being relied upon to force a just settlement after the facts have been brought to light. "As a means of preventing industrial warfare" this latter "far surpasses every arbitration scheme that has ever been tried."[18] The peaceful settlement of such a serious incident as the Dogger Bank affair (1904) as the result of simply an investigation of the facts conducted before the International Commission of Inquiry at the Hague shows that this method is no less effective in the international field.

The causes of war were attributed to three principal sources of disagreement involving; (a) rights over territory, trade privileges, etc., (b) national policy which may demand that a country be allowed to push its trade in certain spheres, to acquire new territory or influence, or "insist upon a certain course of action by other countries"; (c) national feeling which though often deep and bitter and "the most dangerous of all causes of war . . . ordinarily depends in the beginning upon different views regarding the specific rights of the two countries."[19]

The establishment of a true international court of justice it was felt was an urgent need. Not only would its operation at once begin to create authoritative international law in the form of judge-made law, but its very existence would invite

[17] C. W. Eliot.

[18] Idem.

[19] Elihu Root.

the codification of international law and the formal adoption of such law by the nations, just as the Prize Court, adopted by the Second Hague Conference, led to the London Conference (1908–9) which codified the law of prize.

The criticism has been made that the awards of courts of arbitration have been so generally accepted because burning questions have not been submitted to arbitration: that wars which have actually occurred were over differences too serious for peaceable adjustment. There is much force in this criticism, but an impartial analysis[20] of wars in which our own country has engaged shows that, at least as applied to us, the criticism is far too sweeping; that many of the controversies could have been peaceably composed and that certainly if, at the time of these wars, an international court had existed and international practice in regard to the subjects of the controversies had been as defined as now, these wars could have been avoided. Moreover, nations which hesitate to enter a court of arbitration because they regard the interests at stake as too important to subject to the risk of compromise, will be more willing to abide the decision of a true court of justice which shall be governed by established international practice, or, in its absence, will at least apply the general principles of justice.

The objection to having on an international tribunal nationals who must be consciously or unconsciously prejudiced in favor of their country and who act as advocates rather than judges is enhanced by the fact that the proper relation between court and counsel cannot obtain between them and the umpire, "no ethical rule" preventing "the national commissioner from addressing himself at any time to a fellow judge."[21] The later system of allowing the disputants to select non-nationals has not overcome the difficulty because the non-nationals "readily take on the color,—the attitude of mind,—of the disputant to whom they owe their selection."[22] Not only should no national ever again be allowed to sit upon arbi-

[20] J. W. Foster.
[21] J. H. Ralston.
[22] F. D. McKenny.

tration tribunals, including the Hague Tribunal, but there should exist a freely acknowledged right to challenge any of the proposed arbitrators, for the reason that the close relations existing between some nations make their subjects quite as predisposed to favor the cause of a friendly country as its own national would be.[23]

Touching the question of the powers of the proposed court, it is presumed that it would start with very limited or no jurisdiction, that questions would be referred to it voluntarily or by agreement of the powers in pairs or otherwise, but that the growing confidence of the world in the probity and ability of the court would gradually lead to an ever widening jurisdiction. An ultimate extreme position, involving jurisdiction over the question of the very independence of a state, is imagined as follows:—"If, for instance, a given nation should prove to be so unruly, so anti-social and so injurious to international order that its existence ought no longer to be tolerated, the powers, acting together on the mandate of an international judicial tribunal rather than on the mandate or agreement of the foreign offices, might decree the extinction of the national life of the state in question, just as the criminal court within a state may decree the extinction of the life of a malefactor. It may easily be that such a case would never happen. At the same time it is conceivable; and should it occur, would it not rest on a far sounder basis than transactions which have occurred in the past, and which, whatever their jurisdiction in point of equity, after all, have had the appearance of simple international spoliation."[24]

Moreover, if given jurisdiction over internal disputes, which are acute and threaten widespread disorder or revolution, an international court may at times prove effective in avoiding civil war; although, before this much desired result can be reached, the nations must recognize as supreme and universal the rule that no political entity be allowed to deprive the individual of "life, liberty or property without due process of law"; just

[23] J. H. Ralston.
[24] H. P. Judson.

as within the boundaries of the United States neither local nor federal government may violate this principle.[25]

In considering the difficulties of the composition of the proposed international court, which would be too unwieldly if each of the forty-three nations participating in the Second Hague Conference should be allotted a permanent representative in the court, it was pointed out that "in the discussion of the Supreme Court of the United States the then thirteen states were considered, with all their ideas of sovereignty provided for in the composition of the United States Senate, as having possible rights to be represented in the Supreme Court of the United States."[26] Owing to the difficulty of arriving at an acceptable basis of representation in the court, it may be necessary to set up a court without the initial coöperation of the smaller states, the high character of the court and its practical advantage being relied upon ultimately to "secure the adherence of other nations, even though the latter did not secure the representation they desired on the court."[27]

The fundamental requisites for a permanently successful court, were indicated as: "First, that its procedure be expeditious and the rights of contending parties be guaranteed; second, that the constituents of which it is composed be respected by all civilized nations; and lastly, that the principles it is called upon to apply be clear, and such as shall have merited universal approval."[28]

The latter need, the need of searching out the fundamental principles of international law and justice, of formulating them, and of having them adopted by the civilized nations was emphasized repeatedly during the Congress, not only in relation to the proposed court, but with reference to the general good relations of the world.

"The main objection to a general and absolute treaty of arbitration lies in the want of an authoritative code of laws

[25] A. H. Snow.
[26] H. B. F. Macfarland.
[27] Idem.
[28] Francisco Leon de la Barra.

governing states, as the municipal laws of a state govern its citizens."[29] The new Carnegie endowment for peace was urged to initiate this work.[30]

Although the scantiness of authoritative international law was clearly recognized, it was presumed that the nations will none the less boldly empower the international court to fall back upon the wisdom of its day, and declare as law what it finds to be the just practice of men. Just as the ancient tribe in the absence of written codes relied upon its judges to declare the law, so "the great tribe of the world" will set up a body of judges who shall say "There is no code, but this is the wisdom and the justice of the human society to which we belong."[31] In much the same way the Supreme Court of the United States has proceeded to interpret and apply international law. "For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision," says the Court itself, "resort must be had to the customs and usages of civilized nations, and as an evidence of this, to the works of jurists and commentators who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects which they treat. Such works are resorted to by judicial tribunals, not for the speculation of their authors as to what the law ought to be, but for trustworthy evidence of what the law really is."

(In re. Paquete Habana, 175, U. S. 677.)[32]

Supplementing judge-made law there is likely to be a rapid codification of certain spheres of international law invited by the very existence of the court. In this twofold way the crystallization of authoritative international law is likely to proceed at a pace hitherto unprecedented, making text books obsolete at short intervals. Just as the practical inventions have made more progress in the past one hundred fifty years than in the whole previous period of recorded history, so author-

[29] W. R. Riddell.
[30] T. N. Page.
[31] O. T. Crosby.
[32] Quoted by F. N. Judson.

itative international law in the true acceptation of the term is likely to show greater development in the near future, following the establishment of an international court of justice, than in the whole past.

As international law should adjust and reconcile "not override conflicting systems"[33] of law, the question presents itself to what extent the proposed international court will be expected to combine the principles of the court of law and the court of equity, and, until the law becomes more definitive, even introduce in a measure the spirit of compromise which characterizes diplomacy. Some such broad character must attach both to the law and the court in order to make them acceptable in the beginning and possibly for many years to come. "A true international court of jurists will have an international mode of interpretation, a blend perhaps of civil law and the common law, or of Oriental and Western rules."[34]

The Interparliamentary Union, which has met annually for the past seven years, was referred to as a body of over "2,000 lawmakers of the parliaments of the world bending every energy to substitute law and justice for force."[35] It was suggested that the Union should be reorganized by providing for a less unwieldy number of members who shall be chosen and specially delegated by the home parliaments. Add to this provision an agreement on the part of the home parliaments that all measures adopted by the Interparliamentary Union shall be, not necessarily approved by them, but at least considered and given a chance to be approved, and a great step will be taken toward giving expression to the international will. As, over against this quasi-popular branch of an international legislature, we have in embryo an upper house in the form of the Hague Conferences, the members of which are delegated by the executive branches of the home governments, it is not unlikely that in the course of time these two bodies will evolve a true international parliament. The origin of most

[33] F. W. Hirst.
[34] Idem.
[35] Richard Bartholdt.

of our sound institutions is in the needs of the community. There is very great need of an institution which shall help to crystallize and give authority to the more commonly accepted practices of the world today in international relations and thus help build up authoritative international law.

The project of an international force to compel submission to the decrees of the international court was examined and rejected because there are "so many natural jealousies to be surmounted" . . . and "so many obstacles to the exercise of such a power." Public opinion was thought to be a better sanction and in course of time could be developed into an effective sanction.[36]

Questions of honor and vital interest have hitherto been excluded by the more powerful countries from the scope of treaties for the submission of future disputes to arbitration. So long as these exceptions existed, arbitration treaties were not a guarantee of peace, for the double reason that questions, actually involving honor, etc., might at any time arise and that a nation bent on mischief might so interpret other questions.

It was therefore of distinct advantage to the future peaceful relations of the world when, earlier in the year, the President of the United States declared that he saw no reason why questions of honor should be so excluded. But at the Washington conference of the society, the gap in the ramparts was completely closed by the new pronouncement of President Taft in favor of an agreement which shall serve to demonstrate that all questions, even such as involve honor or territory, may be safely referred to an international arbitration court. The statement attracted world-wide attention; it was the subject of a telegram of congratulation from the editors of the leading Liberal newspapers of England, it is likely to lead to important practical results, and it must remain as the most notable utterance at the congress.

[36] H. B. Brown.